PRACTICE AND PROCEDURE

The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013:

An Overview of the Key Provisions & ET Fees

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OLD SQUARE CHAMBERS

Introduction

On 31 May 2013, the ***Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013*** (SI 2013/1237) were laid before Parliament. Some key milestones are set out below:

- July 2012 Mr Justice Underhill (now LJ) undertakes a review of the ET Rules (recommendations submitted to Ministers)

- Sept – Nov 2012 public consultation on ET rules: draft Rules of Procedure are set out at Annex A to the consultation documentation

- March 2013 Government provides Response to Underhill Review - no substantial changes made to draft rules. The Government expressed its desire to keep the rules simple, allow for flexibility, and where further consideration is needed, to pass that on as an issue for Presidential guidance

- The Government will consider publishing a guide to the new rules

The Regulations adopt a similar structure to the existing ***Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004***. Schedule 1 contains the Rules of Procedure; Schedule 2 makes provision for cases involving National Security; and Schedule 3 contains the Rules of Procedure applicable to Equal Value claims.

This paper provides a summary of some of key provisions contained within Schedule 1 of the Rules of Procedure. For ease of reference, the text of some of the new provisions is also reproduced[1].

Implementation

When will the new rules come into force? The Government said previously *'it is envisaged that the new rules will come into force in the summer, alongside those changes required to introduce fees…'* (para 106). It has recently announced that the new fees regime will come into force on Monday 29 July 2013. The majority of the provisions in the Regulations will also come into force on the same day – 29 July.

Transitional Arrangements

It is understood that the Regulations will **not** contain any transitional provisions – i.e. t they will apply to all cases in the system from 29 July 2013, not just those issued on/after that date: Reg 1.

A limited exception applies in respect of Employer's Contract claims (counterclaims): Reg 15(2). Where a respondent receives a Claim Form from the ET before 29 July, Rules 23-25 in Sch 1 are disapplied and the 2004 Rules of Procedure prevail.

Rationale

[1] References to paragraphs in brackets are to the Government's Consultation or Response.

The Rules of Procedure must be evaluated in context, namely against the backdrop of the Government's explicit agenda of reducing the number of cases that reach Employment Tribunals (and/or final contested hearings). The following justification for introducing the New Rules was given by Jo Swinson MP:

> ***'… it should be seen very much as one part of our commitment to ensuring disputes are resolved as early as possible, and where possible, outside of the Employment Tribunal****. A lot has been achieved. We have increased the qualifying period for unfair dismissal cases from one to two years, given judges the power to sit without lay members in unfair dismissal cases, and have given them greater flexibility when making costs or deposit orders by raising the upper limits. And there is a lot more to deliver. The Employment and Regulatory Reform Bill is nearing completion in Parliament, and includes: a power to amend the cap on compensatory awards for unfair dismissal, which we intend to use to introduce a cap of 12 months' pay (alongside the existing cap); a new provision which stipulates that the offer of a settlement agreement is inadmissible as evidence in subsequent unfair dismissal cases, and a new process for Early Conciliation of employment disputes, which will require individuals to send details of their prospective claim to Acas before it can be lodged at an Employment Tribunal.'*

Presidential Guidance (Rule 7)

Rule 7 makes provision for Presidential Guidance. This is not wholly new – the power to issue such guidance does currently exist, but the intention is that greater use will be made of this power.

The key aim of Presidential Guidance is explain the process, to roll out matters of good practice across different regions, ensure greater consistency in decision-making, and to manage expectations. For example, one key point is to manage the expectations of litigants who have read about the substantial awards in the media - whereas in fact the average award is circa £5,000(para 27).

Rule 7 confirms that ETs '*must have regard to any such guidance, but they will not be bound by it*' (*query* therefore the status is similar to the ACAS Code of Practice on Disciplinary & Grievance Procedures?).

Annex B of the draft rules contained indicative Presidential Guidance regarding postponements and default judgments. The Government has confirmed that it would like to have Presidential guidance in respect of costs awards and also in respect of timetabling of hearings.

One potential problem area which might arise is in relation to the subject matter which is apt for Presidential Guidance. In the past, there have been differences in judicial practice in England & Wales and in Scotland, particularly in respect of the exercise of discretion. In England & Wales, there has, on occasion, been a tendency to enumerate principles – sometimes coming close to codifying judicial discretion. Whereas in Scotland, the tendency is to veer away from providing codification, it being seen as something which stultifies discretion.

Presidential Guidance

7. The Presidents may publish guidance for England and Wales and for Scotland, respectively, as to matters of practice and as to how the powers conferred by these Rules may be exercised. Any such guidance shall be published by the Presidents in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

"The Sift" (Rules 26-28)

The new rules provide that after the Claim Form and Response have been lodged, each case will go before an EJ to conduct a paper sift. Instead of referring to a judicial 'sift', the New Rules apply the label *'Initial Consideration'*.

The intention is that EJs will consider the file earlier in the process. Whilst many Regions already undertake a sift process, this is seen as a step towards allowing for greater uniformity in practice across the various Regions.

Rules 26-28 provide that where the EJ considers that the ET has no jurisdiction to entertain a claim, or where a Claim/Response or part of it has no reasonable prospect of success, the ET will send a notice setting out the EJ's view, or a show cause/unless order. If either cause is shown, the EJ can either allow the Claim or Response to proceed to a final hearing, or convene a hearing to consider the matter further. Only the affected party need attend.

The practical effects are likely to be an increase in *'preliminary hearings'* – see below.

Respondents: at the beginning of the ET3, Respondents will wish to highlight what powers it invites the EJ to exercise at the sift stage, providing reasons in support.

Claimants: save in the clearest of cases, it will usually be quite difficult for Claimant's to pre-empt what defence will be advanced in the ET3 when the claim is presented, and assert that the defence has no reasonable prospect of success. However, where it is possible to do so, there is no reason why a Claimant should not identify matters which might be appropriate to be dealt with at the sift stage. For example, it is open to a Claimant to plead that if the Respondent denies that the dismissal was unfair for the purposes of s. 98(4) ERA 1996, the Claimant will seek a preliminary hearing (specifying clear grounds of unfairness/breach of disciplinary procedure etc…).

Alternatively, there would perhaps be greater merit in Claimants writing to the ET after receipt of the ET3. At that stage Claimants would be able to explain precisely how/why it is suggested that any defence does not have any reasonable prospect of success.

Projecting ahead, pleadings are likely to now become more comprehensive with parties quoting from minutes and key documents rather than merely summarising their content in order to seize a tactical advantage at the interlocutory stages (and, also in order to stave off the threat of an adverse order at a preliminary hearing).

Initial consideration
26.—(1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Judge may order a party to provide further information).
(2) Except in a case where notice is given under rule 27 or 28, the Judge conducting the initial consideration shall make a case management order (unless made already), which may deal with the listing of a preliminary or final hearing, and may propose judicial mediation or other forms of dispute resolution.

Dismissal of claim (or part)

27.—(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—
(a)setting out the Judge's view and the reasons for it; and
(b)ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.
(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.
(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.

Dismissal of response (or part)
28.—(1) If the Employment Judge considers that the response to the claim, or part of it, has no reasonable prospect of success the Tribunal shall send a notice to the parties—
(a)setting out the Judge's view and the reasons for it;
(b)ordering that the response, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the respondent has presented written representations to the Tribunal explaining why the response (or part) should not be dismissed; and
(c)specifying the consequences of the dismissal of the response, in accordance with paragraph (5) below.
(2) If no such representations are received, the response shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the response (or part) to stand or fix a hearing for the purpose of deciding whether it should be permitted to do so. The claimant may, but need not, attend and participate in the hearing.
(4) If any part of the response is permitted to stand the Judge shall make a case management order.
(5) Where a response is dismissed, the effect shall be as if no response had been presented, as set out in rule 21 above.

Strike Out (Rule 37)

Strike out is given more prominence in Rule 37 (EJs can strike out a Claim/Response at any point in proceedings) – but there is actually little substantive difference as to the circumstances in which a case can be struck out. It is therefore a cosmetic change, but one reflecting the underlying intention, namely that EJ's should not be afraid to manage cases robustly.

The only other cosmetic change is that *'misconceived'* no longer features in the New Rules.

Striking out
37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a)that it is scandalous or vexatious or has no reasonable prospect of success;
(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c)for non-compliance with any of these Rules or with an order of the Tribunal;
(d)that it has not been actively pursued;
(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Preliminary Hearings (Rules 48, 53-56)

Concern had been expressed at the inefficiency/cost of holding a separate CMD and a PHR (a practice adopted in some Regions). This has been met with the creation of a 'new' hearing – *'preliminary hearings'*.

The subject matter of what can be considered at preliminary hearings is similar to the existing PHR (a menu of items is listed in Rule 53).

Preliminary hearings will be held in private in respect of case management, but will be in public where it will determine any preliminary issue or consider striking out a claim or Response (Rule 56). The ET may however determine that the entire hearing is held in public.

Parties are to be notified of the issues that will be covered in advance of any preliminary hearing (Rule 54). *Query* whether this will result in generic/vague notices – i.e. to consider whether any part of the claim should be struck out or a deposit should be ordered, without identifying precisely what parts of the Claim/Response are in issue? The aspiration is that the notices will be sufficiently clear, but the Rules are not prescriptive as to how precise the notice actually has to be.

Rule 48 allows an ET to convert a preliminary hearing into a final hearing if the ET is properly constituted and it is satisfied that neither party *'will be materially prejudiced by the change'* (note the test of 'material prejudice' as opposed to plain prejudice). There is potential for ETs to issue reluctant parties with a stark choice of either converting the matter to a final hearing there and then, or to face a costs risk if the matter has to proceed to a further hearing. This rule could however be used by parties to fast-track litigation if they make the effort to apply for the hearing to be converted in advance (particularly where their chances of getting the Claim/Response struck out are weak, but their chances of securing a deposit are fair).

Scope of preliminary hearings
53.—(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—
(a)conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);
(b)determine any preliminary issue;
(c)consider whether a claim or response, or any part, should be struck out under rule 37;
(d)make a deposit order under rule 39;
(e)explore the possibility of settlement or alternative dispute resolution (including judicial mediation).
(2) There may be more than one preliminary hearing in any case.
(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).

Fixing of preliminary hearings
54. A preliminary hearing may be directed by the Tribunal on its own initiative following its initial consideration (under rule 26) or at any time thereafter or as the result of an application by a party. The Tribunal shall give the parties reasonable notice of the date of the hearing and in the case of a hearing involving any preliminary issues at least 14 days notice shall be given and the notice shall specify the preliminary issues that are to be, or may be, decided at the hearing.

Conversion from preliminary hearing to final hearing and vice versa
48. A Tribunal conducting a preliminary hearing may order that it be treated as a final hearing, or vice versa, if the Tribunal is properly constituted for the purpose and if it is satisfied that neither party shall be materially prejudiced by the change.

Timetabling of Hearings (Rule 45)

Rule 45 gives ETs a clear mandate to prevent overly long and disproportionate oral evidence, questioning, and submissions. Express reference is made to ETs imposing guillotines. Of course, this is nothing new – but the idea is that a *'specific rule should help to encourage greater consistency'* and use (para 44). It is clearly designed to encourage EJs to act boldly. Rule 45 confirms that the ET *'may prevent the party from proceeding beyond any time so allocated.'*

Reviews/Reconsiderations (Rules 70 - 73)

Review applications have been re-labelled – they are now referred to as *'reconsideration of decisions'* (rule 70).

An application for 'reconsideration' involves 2 Stages:

- Stage 1 – the EJ considers whether there is no reasonable prospect of the 'original decision' being varied. If so the application is refused (Rule 72(1)).

- If the application is not dismissed at Stage 1, the EJ will send a notice to the parties (a) setting a time limit for any response; and (b) seeking views on whether the application can be determined without a hearing.

- Note: Rule 72(1) also provides that the notice *'may set out the Judge's provisional views on the application'*.

- Stage 2: is the consideration of the application either at a hearing or on papers.

Note – the clear intention is that applications for reconsideration should be capable of being dealt with on the papers, thereby saving time, expense and use of judicial resources.

Principles
70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application
71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process
72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Reconsideration by the Tribunal on its own initiative
73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

Costs (Rules 74-84)

Costs are awarded in around 0.5% of cases that proceed to a full hearing (para 55). The Government has made reference to the fact of *'anecdotal evidence from the judiciary suggests that there may be more cases than this where a cost award might be warranted by an individual's behaviour at tribunal, but judges are not making orders'*.

The Government wants the issue of costs to be addressed by way of Presidential Guidance with the stated aim being to *'encourage judges to … make greater use of cost awards'*, observing that this was a *'really important area'* (paras 68-69).

Rule 75(1)(b) and (c) expressly empowers ETs to make costs awards in respect of ET fees and expenses incurred by witnesses (this has to be in reaction to recent changes in these areas).

Rule 76(1) reproduces the existing jurisdiction in respect of costs e.g. acting vexatiously etc… but misconceived is once again confined to legislative pasture and is replaced with the reference to *'no reasonable prospect of success'*.

As is the position currently, ETs can award costs of up to £20,000 (Rule 78(1)(a)). They will be able to award costs above this limit to take into account fees and witness expenses for instance: Rule 78(3).

What is new is that ETs *'may'* now do detailed assessment themselves and award costs in excess of £20,000 (Rules 78(1)(b) and (3)). The justification is that the current process of referring the issue of costs to the County Court for detailed assessment is *'an unnecessary process that caused undue delay…'*

Presidents are to decide whether additional training is required for EJs to do detailed assessments (para 63).

Preparation time orders are assessed at an hourly rate of £33 from 6 April 2013 (increasing by £1 annually: Rule 79(2))

When a costs order or a preparation time order may or shall be made

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a)a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b)any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

The amount of a costs order

78.—(1) A costs order may—

(a)order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b)order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, **or by an Employment Judge applying the same principles**; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(31), or by an Employment Judge applying the same principles;

(c)order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d)order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e)if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Collective Agreements (Rule 97)

One aspect of the New Rules which has yet to receive much attention is the provisions relating to collective agreements. In respect of claims brought under s. 146 EqA 2010 which relate to terms of a collective agreement, every employer, organisation of workers, or organisation of employers – whether or not referred to in the Claim Form – *'shall'* all be a named respondent to the proceedings.

The only discretion conferred upon EJs in relation to this issue is if it is not considered to be reasonably practicable to identify the organisation(s) in question after undertaking reasonable enquiries.

Collective agreements
97. Where a claim includes a complaint under section 146(1) of the Equality Act relating to a term of a collective agreement, the following persons, whether or not identified in the claim, shall be regarded as the persons against whom a remedy is claimed and shall be treated as respondents for the purposes of these Rules—
(a)the claimant's employer (or prospective employer); and
(b)every organisation of employers and organisation of workers, and every association of or representative of such organisations, which, if the terms were to be varied voluntarily, would be likely, in the opinion of an Employment Judge, to negotiate the variation.
An organisation or association shall not be treated as a respondent if the Judge, having made such enquiries of the claimant and such other enquiries as the Judge thinks fit, is of the opinion that it is not reasonably practicable to identify the organisation or association.

Deposit Orders (Rule 39)

Somewhat surprisingly the Government consultation document stated that an EJ *'cannot order a deposit to be paid in respect of a particular allegation within a claim only'* (para 63). This is wrong since a deposit can be ordered in respect of any 'issue' in any proceedings. Irrespective of whether there is room for debate about this point, the Government has put the matter beyond doubt: a deposit can now be ordered in respect of *'any specific allegation or argument in a claim or response…'*

Rule 39 provides for a maximum deposit of £1,000. The ET must make reasonable enquiries as to means and the deposit must be paid within 21 days.

What is clear from reading the consultation documents is the Government's desire for EJ's to make greater use of deposit orders.

Deposit orders
39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

Interest

Research undertaken by the MoJ in respect of judgment debts found that 39% of interviewees had not be paid in full (2009). Of those 39%, only 36% attempted to enforce the award in the County Court (para 69).

Currently interest accrues 42 days after judgment (save for equal pay/discrimination claims): ***Employment Tribunals (Interest) Order 1990***. The original proposal was that interest should accrue 14 days from the day after judgment is sent to the parties (para 73). The Government has modified the proposal so that interest accrues from the date of judgment but will not apply if payment is made in full within 14 days (para 97).

Withdrawals (Rules 51-52)

Currently (under Rule 25 of the 2004 Rules), when a claimant withdraws a claim, the case will not be dismissed unless and until the respondent applies for the case to be dismissed.

In 2011-12 30% of all claims were disposed of by withdrawal.

Rule 52 now provides that the ET *'shall'* issue a judgment formally dismissing the claim unless (a) the Claimant has expressed at the time of withdrawal a wish to reserve the right to bring such further claim; and (b) the ET is satisfied that there would be a legitimate reason for doing so. The presumption/default setting therefore is for claims to be dismissed.

End of claim
51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

Dismissal following withdrawal
52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—
(a)the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
(b)the Tribunal believes that to issue such a judgment would not be in the interests of justice.

Lead case mechanism (Rule 36) - currently the ET identifies a lead claim and stays the remainder. It is proposed that where the ET identifies lead claim(s), the decision will automatically bind all related claims (Rule 36(2)). The proposals allow for parties to have decisions dis-applied in relation to the specific circumstances of their claim if they make an application within 28 days of the ET decision (Rule 36(3)). Again, there is little change to what already happens in practice.

Lead cases
36.—(1) Where a Tribunal considers that two or more claims give rise to common or related issues of fact or law, the Tribunal or the President may make an order specifying one or more of those claims as a lead case and staying, or in Scotland sisting, the other claims ("the related cases").

(2) When the Tribunal makes a decision in respect of the common or related issues it shall send a copy of that decision to each party in each of the related cases and, subject to paragraph (3), that decision shall be binding on each of those parties.
(3) Within 28 days after the date on which the Tribunal sent a copy of the decision to a party under paragraph (2), that party may apply in writing for an order that the decision does not apply to, and is not binding on the parties to, a particular related case.
(4) If a lead case is withdrawn before the Tribunal makes a decision in respect of the common or related issues, it shall make an order as to—
(a)whether another claim is to be specified as a lead case; and
(b)whether any order affecting the related cases should be set aside or varied.

Miscellaneous

Full merits hearings are now referred to as *'final hearings'* (Rule 57).

Interim relief proceedings (s. 165 TULRCA 1992, s. 128, 131 ERA 1996) – an ET will not hear oral evidence unless it directs otherwise (Rule 95)). This reflects current practice.

EHRC - ETs 'shall' send copies of all judgments and written reasons to EHRC relating to complaints under ss 120, 127, 146 EqA 2010 (Rule 103).

Written Reasons (Rule 62) - reasons can be requested by a party at any stage of the process, including final decisions or for 'smaller issues' (e.g. adjournments). EJs can take a proportionate approach and where appropriate written reasons can be *'very short'* (Rule 62(4)).

Time limits (Rule 4) - Previously, it was proposed that any act which is required to be done on or by a particular day must be done before 5pm on that day. This proposal has been dispensed with and the midnight guillotine continues to apply.

II. FEES

In July 2012 the Government published its response to the consultation on Tribunal Fees. It has recently announced that the new regime will come into force on **Monday 29 July 2013**.

Fees can be paid at 3 stages:

- Upon the issue of proceedings
- At the time of receiving notice of a final hearing
- Applications

There are 2 'levels' of claims:

- Level 1 claims (e.g. generally sums due on termination, redundancy pay, holiday pay): issue fee £160, hearing fee £230
- Level 2 claims (all other claims): the issue fee will be £250, the hearing fee will be £950.

ETs have discretion to order the losing party to meet the fees paid for by the winning party (*query:* this may be appropriate for single issue claims, but not complex litigation?).

There is no refund of fees if cases settle. What this means is that either settlements will increase by £1,200 (to factor in the costs of fees in level 2 claims), or result in parties trying to settle before fees are incurred.

Multiple claims

- Between 2 – 10 claimants: the fee is 2x the fee for single claims
- 11 – 200 claimants pay a fee of 4x the fee for single claims
- 201+ claimants pay a fee of 6x the fee for single claims

Fees for Applications

- Counterclaims - £160
- Review of default judgments - £100
- Reviews/'reconsideration of decisions' either £100 or £350 depending on level
- Fees for Judicial Mediation = £600 to be paid by Respondents

Time Limits & Fees

- Claims will still be treated as presented in time if accompanied by an application for remission - even if that application is dealt with later or it is decided that the Claimant does not qualify.

- Non-payment of a fee or failure to submit an application for remission will lead to a claim being rejected: Rule 11.

Rejection: absence of Tribunal fee or remission application
11.—(1) The Tribunal shall reject a claim if it is not accompanied by a Tribunal fee or a remission application.
(2) Where a claim is accompanied by a Tribunal fee but the amount paid is lower than the amount payable for the presentation of that claim, the Tribunal shall send the claimant a notice specifying a date for payment of the additional amount due and the claim, or part of it in respect of which the relevant Tribunal fee has not been paid, shall be rejected by the Tribunal if the amount due is not paid by the date specified.
(3) If a remission application is refused in part or in full, the Tribunal shall send the claimant a notice specifying a date for payment of the Tribunal fee and the claim shall be rejected by the Tribunal if the Tribunal fee is not paid by the date specified.
(4) If a claim, or part of it, is rejected, the form shall be returned to the claimant with a notice of rejection explaining why it has been rejected.

- However, whereas Rule 11 sets out the general approach, it remains to be seen how this interplays with Rule 40 which, at first blush, seems to provide the opposite. However, Rule 40 is likely to apply where a claim has not been rejected under rule 11, and, for instance, a party has not paid the appropriate fee for a final hearing or application.

Non-payment of fees
40.—(1) Subject to rule 11, where a party has not paid a relevant Tribunal fee or presented a remission application in respect of that fee the Tribunal will send the party a notice specifying a date for payment of the Tribunal fee or presentation of a remission application.
(2) If at the date specified in a notice sent under paragraph (1) the party has not paid the Tribunal fee and no remission application in respect of that fee has been presented—

(a)where the Tribunal fee is payable in relation to a claim, the claim shall be dismissed without further order;
(b)where the Tribunal fee is payable in relation to an employer's contract claim, the employer's contract claim shall be dismissed without further order;
(c)where the Tribunal fee is payable in relation to an application, the application shall be dismissed without further order;
(d)where the Tribunal fee is payable in relation to judicial mediation, the judicial mediation shall not take place.
(3) Where a remission application is refused in part or in full, the Tribunal shall send the claimant a notice specifying a date for payment of the Tribunal fee.
(4) If at the date specified in a notice sent under paragraph (3) the party has not paid the Tribunal fee, the consequences shall be those referred to in sub-paragraphs (a) to (d) of paragraph (2).
(5) In the event of a dismissal under paragraph (2) or (4) a party may apply for the claim or response, or part of it, which was dismissed to be reinstated and the Tribunal may order a reinstatement. A reinstatement shall be effective only if the Tribunal fee is paid, or a remission application is presented and accepted, by the date specified in the order.

Fees in the EAT

- Issue fee for an appeal: £400
- Full hearing fee: £1,200

Fee Remission

The MoJ issued a consultation in April 2013 on this issue (not confined to ETs). The proposed remission system has 2 tests:

- (1) *'disposable capital'* of the applicant and/or their partner
- (2) gross monthly income
- Both hurdles (1) plus (2) must be met to qualify for remission

Disposable capital includes savings, investments, redundancy payments but excluding unfair dismissal compensation.

For fees of up to £1,000, remissions will be available if the disposable capital does not exceed £3,000.

For fees between £1,001 - £4,000 remissions will be available if disposable capital does not exceed £8,000.

Where the disposable capital test is met, applicants need to satisfy test (2) which is based on gross monthly income of the applicant/partner

Full fee remissions will apply where the gross monthly income is below:

	Single	In a couple
With no children	£1,085	£1,245
1 child	£1,330	£1,490
2 children	£1,575	£1,735

If + 2 children, gross monthly income is increased by £245 per child

Children must live with the applicant or be paid maintenance by applicant

Recipients of benefits such as income support and income-based JSA would automatically fall below the income threshold provided the disposable capital test is met

The Government proposes that where income exceeds these thresholds, applicants will pay a contribution to the fee of £5 for every £10 their income is above the threshold.

FEWER ETs?

Query to what extent will the introduction of fees really act as a disincentive/deterrent? The initial fees are low and claimants will have some time to acquire the money needed to pay the fees once the notice of a final hearing issued. Has the Government underestimated just how determined litigants are?

Impact Assessment

Costs	**Savings**

• Claimants: c £7-9m pa • Respondents: c £1m pa • HMCTS: c £3m to set up new system + c £1-2m pa to operate. • Lawyers potentially lose up to £9m pa due reduced demand for ET advice/representation, but compensating adjustments in the UK market for legal services	• Employees who choose not to bring ET claim avoid costs, c £2-6m pa. • Employers who do not have to respond to a claim avoid costs, c £2-10m pa. • Taxpayers gain c £8-10m pa as contribution to costs of ETs met by users • Taxpayers also gain c £2-6m pa in HMCTS operational savings due to reduced demand for services.

The changes must also be seen as part of wider package of measures targeting the ET system:

- ***Unfair Dismissal and Statement of Reasons for Dismissal Order 2012*** – increase in qualifying period 1 > 2 years (estimated reduction of 2,000 claims pa)

- Amendments to 2004 Rules of Procedure from April 2012 (increase of maximum deposit from £500 to £1,000; costs jurisdiction increased from £10,000 to £20,000)

- Removal of automatic witness expenses in ET proceedings

- Pre-Action Conciliation by ACAS (ss 7 – 9) ***Enterprise and Regulatory Reform Act 2013*** – before a claim is lodged, the Claimant must provide ACAS with prescribed information. If ACAS considers conciliation is not possible or the prescribed period has expired, they will issue a certificate. The Claimant will only be able to issue proceedings once they have a certificate. Time limits will be extended.

- Changing the cap on Compensatory Awards (s 13) provides a power to make regulations to amend the cap (£72,300) up or down

- January 2013 proposal that the cap is £72,300 or 12 months' pay – whichever is lower

- Settlement agreements (not protected conversations) - section **111A ERA 1996**.

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